

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 565 OF 1994

BETWEEN:

J. K. KHAMISA PLAINTIFF

- and -

THE ATTORNEY GENERAL DEFENDANT

CORAM: TEMBO, J.

Msiska, of Counsel for the Plaintiff

Maluwa (Mrs), of Counsel for the Defendant

Daudi (Mrs), Official Interpreter

Namangwiyo, Recording Officer

J U D G M E N T

Tembo, J. By his writ and amended statement of claim, the plaintiff is claiming damages from the defendant for the (a) infringement of his human rights; (b) infringement of his right to privacy (c) trespass to his property; (d) loss of his honour and defamation of character; (e) lost and damaged items, in the sum of K7,870.00; and (f) loss of use of his personal and household effects for 7 months. The plaintiff has also claimed costs for this action. On his part, by his amended defence, the defendant denies any liability therefor and prays that the plaintiff's case be dismissed in its entirety with costs.

It is expedient to point out, at the outset, that although the defendant was represented during the entire trial, and had therefore fully participated in the proceedings by cross-examining plaintiff's witnesses, the defendant did not proffer any evidence at all on his behalf. Upon the close of the plaintiff's case, the Court had called upon counsel for the defendant to call and examine witnesses for the defendant in the case. In order to allow the defendant ample opportunity for doing so, the hearing of the case had then been adjourned several times, but to no avail. In the circumstances, the Court has eventually accepted the submission and prayer of counsel for the plaintiff that the court should now merely proceed to the consideration of the evidence which has been adduced by and for the plaintiff and, thereupon, to the determination of the claim, of the plaintiff in the instant case.

To begin with, it must be noted that the Court has only heard two witnesses, both of whom have testified for the plaintiff. These are the plaintiff, himself, and Mr J. W. Sani. The following facts have emerged from their testimonies: The plaintiff is an employee of the Government of Malawi. He joined the public service in October, 1964. In or about 1987 to 1990, the plaintiff had been posted to diplomatic service in Nairobi, Kenya. He had served at the Malawi High Commission to Kenya for three years, in the capacity of Second Secretary. He was responsible for finance and administration. Then, Mr. Nkona was the High Commissioner of Malawi to Kenya and Mr. Sani was the Deputy High Commissioner. Mr. Saini had worked in Malawi's foreign diplomatic missions for 16 years in various capacities including that of deputy high commissioner or deputy ambassador. At the time of offering his testimony, Mr. Sani was Principal Secretary for Health. During periods when both Messrs Nkona and Sani were absent from Nairobi on official duties either in Malawi or elsewhere, the plaintiff had acted as Malawi's High Commissioner to Kenya. Thus the plaintiff had enjoyed a status of a diplomat during the entire tour of his diplomatic service at the Malawi High Commission in Nairobi.

The plaintiff's tour of diplomatic service to Kenya expired in or about August, 1990. Indeed, the plaintiff eventually left Nairobi for Malawi on 1st September, 1990 and he arrived in Malawi on 4th September of that year.

Prior to his departure the plaintiff had packed the luggage of his personal and household effects with the assistance of professional packers and shippers Alenke (Kenya) Limited, the Shippers. In August 1990, his luggage was left in the custody of the shippers in readiness for shipment to Malawi through Beira. Ordinarily, the luggage would have left for Beira on a ship that would have arrived in Beira on such a date which would have enabled the plaintiff to be in receipt of his luggage within 3 months of the date of the ship's and, therefore, the luggage departure from Kenya. The shippers had informed the plaintiff that given the scheduled departure of the ship in question, the plaintiff would receive his luggage within 3 months of the date on which the plaintiff had left Nairobi for Malawi, thus at the latest by December, 1990.

In fact, the plaintiff's luggage was not placed on the ship for that scheduled early departure and, therefore, the plaintiff did not receive his luggage within 3 months of the date of the plaintiff's departure from Nairobi. Instead, the luggage was shipped from Kenya in December, 1990 and it arrived in Malawi in July, 1991. There was, therefore, a delay of 7 months. Unlike the first scheduled ship, the ship which eventually carried plaintiff's luggage did not sail directly to Beira from Mombasa, Kenya, and in all it took about 7 months in transit, instead of only 3 months had it sailed straight to Beira. Why did the plaintiff's luggage miss the ship that had been scheduled for the early departure from Kenya?

When the plaintiff had left Nairobi for Malawi, Mr. Nkona in his capacity as Malawi's High Commissioner to Kenya, had ordered the shippers to unpack and search the luggage of the plaintiff. Yes, by then the plaintiff's luggage was already in the custody of the shippers in readiness for shipment to Beira on the next ship which had been scheduled to depart from Mombasa, Kenya, for Beira, Mozambique, in or about September, 1990. The shippers complied with the orders of the Malawi High Commissioner to Kenya. Consequently, the plaintiff's luggage was unpacked and searched in full view of the shipping agents, officials and employees and their other customers and clientele and also in full view of some staff of the Malawi High Commission to Kenya. The search was allegedly conducted in order for the High Commissioner to ascertain if there were the High Commission's small piece of carpet, normally called a rug, amongst the personal and household effects of the plaintiff, then, in the custody of the shippers. The value of the rug in question was put at not more than 300 Malawi Kwacha. The unpacking and search were conducted, at the instance of the Malawi High Commissioner to Kenya, without the consent, and in the absence, of the plaintiff who was then in Malawi. Indeed no item of the Malawi High Commission to Kenya, including the rug then allegedly sought after, had been recovered from the luggage of the plaintiff during or out of the search in question. The luggage was thereafter re-packed, not securely in that upon receipt thereof some of the personal and household effects were missing and others were damaged. Indeed, given the facts, the Court concurs in the view of the plaintiff that the delay in the arrival of the luggage in Malawi, the damage and loss of some of the personal and household effects had been caused by the conduct of the Malawi High Commissioner to Kenya in requiring that the luggage be unpacked and searched at the shippers' warehouse in Kenya in the absence, and without the consent, of the plaintiff.

By reason of such delay, the plaintiff had to hire some items to be used by him during the entire period when the luggage was in transit. The plaintiff is claiming damages for loss of use for a period of 7 months; thus a period beyond 3 months within which the luggage would have arrived and been received in Malawi had the luggage been allowed to come by the ship which had been scheduled for early departure of the luggage from Kenya.

In conducting the search in the absence and without the consent of the plaintiff, the High

Commissioner had acted in violation of the rights of the plaintiff. Thus, the plaintiff's right to privacy had been violated and the High Commissioner had thereby trespassed on or upon the property.

Further, for all what had happened to the luggage of the plaintiff, at the instance of the Malawi High Commissioner to Kenya, the plaintiff was thought to be a thief who was about to steal or who had stolen Malawi High Commission property on his departure from Kenya at the end of his tour of diplomatic service, there. As a result of this, the plaintiff was shunned by persons in diplomatic circles and generally his character was thus damaged. The gravity or extent of such damage ought to be perceived in the light of the fact that the plaintiff was a diplomat and a person of great integrity and unimpeachable character. Besides, the same ought to be viewed in the light of the fact that the alleged reasons or purposes for the unlawful and futile search of the luggage of the plaintiff were completely unfounded given the facts on the ground, then. There was no basis whatsoever to have justified such action on the part of the Malawi High Commissioner to Kenya, at the time. In the view of the Court, given the facts before it, the High Commissioner of Malawi to Kenya had acted in a high-handed manner and in a wanton disregard of the rights of the plaintiff. Acting, as he purported to have done, in the course of his employment on behalf of the Government of Malawi, the High Commissioner had clearly abused the authority of his office. Unfortunately, the Government is vicariously responsible for the damage thereby caused to the plaintiff.

The plaintiff's reputation in the mind of the right thinking members of the community was damaged. A defamatory statement or matter is one which has a tendency to injure the reputation of the person to whom it refers: **Salmond and Heuston on the Law of Torts** 19th Ed. at page 155 cited with approval by Tambala, JA., in a Supreme Court of Appeal decision in **PTC -v- Joice Ng'oma**, MSCA Civil Appeal No. 30 of 1996. The essential feature of defamatory matter is, therefore, its tendency to damage the reputation or good name of the plaintiff, Tambala, JA., further stated in that case. It is therefore not what the plaintiff feels about himself upon defamatory matter. There has to be a publication of the defamatory matter to some person other than to the plaintiff. And what matters is the effect of the defamatory matter on that other person, in particular as to whether that matter in that person tends to injure the reputation of the person to whom it relates. To such person or persons, since such publication, the plaintiff is henceforth held in contempt and he suffers from ridicule. Both Messrs Sani and Khamisa, the plaintiff, after the occurrence of events relative to this case had reported for further studies at a University in Nairobi. It was there where the plaintiff was, among other things, most shunned and clearly told by those with whom the plaintiff had earlier on enjoyed diplomatic status, then, that they thought he was a thief, after all what had happened to plaintiff's luggage at the instance of the Malawi High Commissioner.

In the circumstances, the plaintiff must succeed in respect of all the reliefs the plaintiff has sought the Court to grant him against the defendant. It is so ordered.

Reverting to the quantum of damages to be awarded, a perusal of the pleadings of the parties, especially the plaintiff's amended statement of claim, clearly shows that in respect of all heads of claim the plaintiff is merely seeking an award of general damages, except for one item where special damages are sought, thus in respect of loss of use. No claim is made for aggravated or exemplary damages. If the plaintiff had intended to seek an award of aggravated or exemplary damages from the Court, it is trite law that, the same ought to have been specifically pleaded in the statement of claim. The writ and the amended statement of claim only make reference to general damages, except as aforesaid in respect of a claim for loss of use where a claim for special damages is made. In his submission learned counsel for the plaintiff appears to be inviting the Court to make an award for aggravated or exemplary damages in respect of damages sought for the defendant's defamation of the plaintiff. To the extent that the same was or is not expressly and specifically pleaded in the writ and statement of claim, the Court has no mandate to the giving of consideration to such an invitation; and on his part, learned counsel for the plaintiff is, thereby, without any legal right or remedy for compelling the Court to react affirmatively to counsel's submission on a prayer for aggravated or exemplary damages in that regard.

Be that as it may, the serious view of the Court is that the Malawi High Commissioner to Kenya had acted in a high-handed manner and in a wanton disregard of the rights and, indeed, welfare of the plaintiff. People in position of authority, like the Malawi High Commissioner to Kenya, ought to act responsibly and in a manner that clearly signifies that they respect the law and, in particular, the rights of persons subject to their authority. They must not, to say the least, appear to act disgracefully and in a wanton violation of the rights of persons subject to their authority. Where such violations do occur, as had happened in the instant case, the Courts must not abdicate from their responsibility of ensuring that appropriate and adequate remedy is afforded to the victims of any harm or damage thereby caused. In the particular circumstances of the plaintiff, and bearing in mind all the foregoing consideration, the Court makes the following award of damages: K250,000 for defamation; K50,000 for trespass to property; K20,000 for the infringement of human rights generally and, in particular, for infringement of plaintiff's right to privacy; K40,000 for lost and damaged items, bearing in mind that the value of the lost and damaged items by now has gone up, by several fold the original value of those items; K20,000 for loss of use of personal and household effects for 7 months. The plaintiff shall also have the costs for this action. It is so ordered.

PRONOUNCED in Open Court this 18th day of September, 2002, at Blantyre.

A. K. Tembo

JUDGE

